No. 16478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEBBIE W. FERRIOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S OPENING BRIEF.

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DONALD W. FORMHALS,

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APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of three counts of an indictment charging him with embezzlement of letters entrusted to him while a Postal Service employee, in violation of Section 1709 of Title 18 of the United States Code [T. 9, 10].

The violations are alleged to have occurred in Riverside County, California, and within the Central Division of the Southern District of California [T. 3, 4].

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

The appellant was indicted on July 2, 1958, by the grand jury on charges of embezzling letters entrusted to him as a postal employee, which letters were intended to be conveyed by mail. The indictment was in three counts, charging the embezzlement of three different letters on June 25, 1958 [T. 3]. The appellant was arraigned on July 21, 1958, before the Honorable Peirson M. Hall. The matter was continued on the court's own motion to July 22, 1958, for plea and to allow appellant to secure counsel [T. 5]. On July 22, 1958, the appellant entered his plea of not guilty to each of the three counts and the matter was set for trial on August 12, 1958 [T. 5]. On August 12, 1958, the government by motion raised the question of the ability of the appellant to then defend himself and assist his counsel in the presentation of his defense as well as appellant's mental condition at the time of the alleged offense [T. 6]. The matter was continued to February 17, 1959, for trial. The court appointed Dr. Edwin E. McNiel to examine the appellant and render to the court a report of his examination and findings as to the present competency to defend himself and assist his counsel and as to his mental condition at the time of the alleged offense [T. 6, 7]. Dr. McNiel examined the appellant on February 10, 1959 [T. 12]. The appellant went to trial on this matter on February 17, 1959 [T. 23] and was defended by appointed counsel, Harry L. Hupp, Esquire [T. 23]. Dr. McNiel's report was not filed until February 19, 1959 [T. 22]. Not only is the record totally void of any evidence, entry or the like indicating that the trial judge had read and considered the report of Dr. McNiel prior to the commencement of the trial on February 17, 1959, but there is absolutely nothing in the record to

indicate that the Court *ever* read or considered this report or any other evidence. Furthermore, the court never conducted any hearing of any kind on the issue of the competency of the appellant to defend himself, and never made any determination of that issue *at any time.* On February 19, 1959, the jury found the appellant guilty of all three counts of the indictment [T. 7, 8]. On March 9, 1959, the appellant was adjudged guilty as charged and sentenced to imprisonment for a period of six months on each of the three counts, the terms to run concurrently [T. 8, 9]. On March 19, 1959, appellant's present counsel filed a Notice of Appeal on his behalf [T. 10, 11]. On July 2, 1959, the statement of Points on Appeal was filed by counsel for appellant [T. 110, 111].

Statement of the Facts.

The appellant was employed as a postal clerk at the Hemet, California, Post Office on June 1, 1954 [T. 24, 25]. On June 25, 1958, he was assigned the duty of dispatching outgoing mail [T. 25]. The person dispatching mail picks up a handful of letters after they have run through the cancelling machine and places them in the various pigeon holes for the various towns, cities and states [T. 25, 26]. The letters he dispatches come from the mail letter drop at the post office or from various collection boxes throughout the city of Hemet [T. 26]. Postal Inspector Willard W. Lynch in June, 1958, was investigating reported losses by patrons of money from first-class letters [T. 29]. The inspection division of the post office has a set procedure to test possible suspects in cases where such losses are reported [T. 30]. They place test letters into the mail. [T. 30]. On June 25, 1958, two such test letters were prepared [T. 31]. The description of these letters is contained in Exhibits 3-A

and 3-B [T. 31]. The test letters themselves are Exhibits 2-A and 2-F [T. 32]. Letter 2-F was deposited in the lobby drop of the Hemet Post Office at 3:30 p.m. on June 25, 1958 [T. 33]. Letter 2-A was so deposited at 3:40 p.m. in the collection box in front of the post office [T. 33]. Witness Lynch testified that Letters 2-B, 2-C, 2-D, and 2-E were letters mailed by patrons of Hemet [T. 33], on the basis that he had letters from the senders as to their mailing of these latter exhibits [T. 33].

After mailing the test letters, Lynch entered the observation gallery and proceeded to observe appellant [T. 33]. At 4:15 P. M., Lynch testified, he saw appellant place a letter into his right side pocket [T. 35]. About 4:30 P. M. appellant left the dispatching case and entered the toilet room [T. 35, 36]. This witness testified that momentarily later he heard the tearing of paper [T. 36], and immediately went through a break-out door and into the toilet and observed appellant seated on a commode [T. 36]. He testified that a torn letter was observed directly below appellant [T. 36] and currency notes were protruding from his left shirt pocket [T. 37]; that the torn letter was recovered and that five other letters were in the possession of appellant at that time [T. 37]. The appellant then went with the Inspector to the Postmaster's office [T. 39]. Appellant was then interrogated by the Inspector [T. 39]. The Postal Inspector stated that the appellant admitted that he took the six letters and threw the particles into the commode [T. 40]; that he took those particular letters because they were going to different charitable organizations in the country [T. 41]; that he had removed

the $2.00 currency bills from the torn letter [T. 41]; that he had been ". . . committing depredation on the mails . . ." for six months and had derived $50.00 [T. 42]. The appellant signed a statement [Government Exhibit 1] to the above effect [T. 43].

The appellant took the stand in his own behalf and testified that he was suffering from a duodenal ulcer [T. 70], with severe intermittent diarrhea and bleeding tarry stool [T. 71]. He had been treated for the condition in service hospitals for a period of six years [T. 72] and was also under the care of a private doctor, Glen Halverson, M.D. [T. 72]. Appellant's bleeding and black stool became continuous from the first of April, 1958, to June 25, 1958 [T. 74]. About 2:30 P. M. on June 25, 1958, appellant commenced sorting mail [T. 75]. Before that time on this day he had to go to the toilet twice because of his condition [T. 76]. He again had to go to the toilet and headed there with a handful of mail in his possession [T. 76]. He did not remember anything from the time he sat down on the toilet until the inspectors came in [T. 77]. He did not remember picking up anything [T. 77]. The inspectors asked him what he was doing with the mail and one said "Here it is" and produced two $1.00 bills [T. 77]. One inspector took the mail [T. 78] and appellant started crying [T. 78]. He went to the postmaster's office [T. 78] and was questioned by the inspectors [T. 79]. He signed his name on Exhibits 2-A or 2-F at the request of the inspector [T. 80]. He could not recall the conversation with the inspectors at that time ex-

cept that he didn't tell them he took $50.00 [T. 81]. He signed his name to the statement introduced as Government Exhibit 1, [T. 82] but didn't read it before signing it [T. 84]. He was emotionally very upset [T. 85].

Dr. Glen Halverson testified he was a physician and surgeon and had been so engaged since 1935 [T. 45]. That he first saw appellant in January, 1955 [T. 46]. and commenced to treat him for a duodenal ulcer [T. 46]. That diarrhea and bleeding through the intestinal tract are relatively common ailments of persons suffering from a duodenal ulcer [T. 47]. That when this condition of bleeding and black stools continues for a period of a week or two, the person would eventually go into a coma [T. 49]. If their condition were something less than the coma stage, they would act reasonably normal but at a later date would be unable to recall any actions that they did, or any events that transpired during this time [T. 49]. The person would also possibly act somewhat dazed [T. 50]. In October, 1955, Dr. Halverson observed appellant in a daze after he had suffered from a prolonged spell [T. 50]. He did not comprehend what was going on at that time [T. 50]. Dr. Halverson testified that the loss of memory resulting to persons suffering from loss of blood from duodenal ulcers was the result of a physical condition; [T. 51] that such persons may or may not realize what they are doing [T. 52], but would possibly appear to be acting normally [T. 54]. Dr. Halverson did not examine appellant at any time within two or three weeks before June 25, 1958, [T. 55].

In rebuttal, Dr. Edwin E. McNiel testified he was a medical doctor specializing in neurology and psychology [T. 58], and that he had examined the appellant on one occasion [T. 59]. He testified that persons suffering from bleeding ulcers, could, if a loss of considerable blood occurred in a short time, proceed to a point of unconsciousness [T. 60], and that it is more likely for a person so suffering to have a loss of memory rather than a loss of reasoning ability [T. 62]. He was of the opinion that the appellant was sane at the time of the offense charged in this matter [T. 64] but it is possible that he might have suffered a loss of memory as to what happened [T. 64].

Specifications of Error.

I.

The District Court erred in that upon the question being raised by the Prosecution as to the competency of the appellant to defend himself and assist his counsel, the court failed to make any determination as to appellant's competency to stand trial. (Statement of Points on Appeal, No. V [T. 111]).

II.

The District Court erred in not instructing the jury to totally disregard the evidence introduced by the prosecution in regard to the statement of charges signed by the appellant, which was claimed to be a confession of the accused. (Statement of Points on Appeal, No. II [T. 110]).

III.

The District Court erred in limiting the cross-examination of the prosecution's witness, Norman H. Wilson, relating to the issue of criminal intent of the appellant. (Statement of Points on Appeal, No. VI [T. 111]).

IV.

The District Court erred in not instructing the jury that a defendant's testimony is to be judged in the same way as that of any other witness. (Statement of Points on Appeal, No. VII [T. 111]).

V.

The record in his case is void of any competent proof that the letters appellant is charged with embezzling had been placed in the United States mails. (Statements of Points on Appeal, No. I [T. 110]).

VI.

The District Court erred in allowing Witness Lynch, over objection, to testify in regard to the cancellation time differences on the letters introduced into evidence and whether or not long and short letters would be together in the dispatch case at the Hemet Post Office when the witness admitted he was not familiar with the procedure at the Hemet Post Office (Statements of Points on Appeal, No. IV [T. 111]).

ARGUMENT.

Specification of Error I.

The District Court erred in that upon the question being raised by the Prosecution as to the competency of the appellant to defend himself and assist his counsel, the court failed to make any determination as to appellant's competency to stand trial.

On motion by the prosecuting attorney, the question was raised in open court of the ability of the appellant to presently defend himself and assist his appointed counsel in the preparation and presentation of his defense [T. 6]. While the Court did appoint a doctor to examine the appellant, there was never any judicial determination of competency. The appointed doctor did file a report on the last day of the trial, [T. 11], but there is no indication whatsoever that the trial judge ever received or considered this report, much less ever made any judicial determination of the competency of the accused to stand trial.

This exact same point was raised in *Gunther v. United States* (1954), 215 F. 2d 493, where the Court of Appeals in reversing a rape conviction, held:

> ". . . the failure of the trial court to make its own finding on appellant's competency to stand trial was error." (*Id.* p. 497).

In a comprehensive analysis of Section 4244 of Title 18 of the United States Code and the legislative history of that Section, the court in the *Gunther* case concludes

that while the statute is not explicit, ". . . the requirement of a subsequent judicial determination of competency to stand trial is implicit therein." (*Id.* p. 495). The legislative history of this section makes it clear that no medical testimony was contemplated as a substitute for the essential ". . . finding of the court" (*Id.* p. 496). Section 4244 does clearly call for a "judicial determination." The history of this statute clearly indicates it was intended to codify the inherent power and duty of the *judge* to be assured the man is competent to stand trial, and no amount of medical or other testimony is the decisive factor, but that the ultimate, necessary act is the finding and judgment of the court. (*Id.* p. 495-496).

In *Watsen v. United States* (1956), 234 F. 2d 42, 44, the Court of Appeals in approving and reaffirming the *Gunther* decision, explicitly states that there should be a determination of competency *noted of record.*

In view of the fact that no opportunity was allowed the appellant to present evidence on this issue, this error cannot be corrected by any determination at this time of appellant's competency at the time of the trial in February, 1959. Justice could only be served be remanding this matter for a new trial, preceded by a judicial determination of appellant's competency to stand trial at this time, and appellant should be permitted an opportunity to submit evidence on this issue. This disposition is particularly appropriate in the light of the appointed psychiatrist's testimony at the time of trial that, although in his opinion, the defendant was sane at the time of the commission of the offense, it was possible that he might have suffered a loss of memory as to what happened [T. 64].

Specification of Error II.

The District Court erred in not instructing the jury to totally disregard the evidence introduced by the prosecution in regard to the statement of charges signed by the appellant, which was claimed to be a confession of the accused.

The prosecutor attempted, over strenuous objection, to introduce a "statement of charges" as a confession or admission of the accused. [T. 92, 93]. The document was merely a recitation of what appellant was charged with and when he signed his name, he simply receipted for the document [T. 96]. Although the prosecutor exclaimed before the jury that it was an "admission" [T. 95, the court, while properly ruling the document inadmissable [T. 97], failed to give any cautionary instruction to the jury regarding the matter. It is submitted that when the prosecutor attempts to introduce highly improper evidence, the court should, besides sustaining the objection thereto, admonish the jury to totally disregard the matter. *Robinson v. United States,* 32 F. 2d 505, 510. The general rule is that misconduct of the prosecutor is not grounds for reversal if the court promptly instructs the jury to disregard the matter. *Ammerman v. United States,* 185 Fed. 1. It would, therefore, follow that when the court fails to so instruct the jury, prejudicial error results to the defendant and the judgment should be reversed.

Specification of Error III.

The District Court erred in limiting the cross-examination of the prosecution's witness NORMAN H. WILSON relating to the issue of criminal intent of the appellant.

The Court was informed that the very gist of the defense was the appellant's physical and mental state at the time

of the alleged offense [T. 28]. The appellant testified that he had severe diarrhea attacks and bleeding through his stool [T. 71, 74], and that he had severe mental effects including performing senseless acts and loss of memory [T. 73].

The defense witness Glen Halverson, M.D., testified that a person having the symptoms testified to by the appellant might act reasonably normal, but at a later date be unable to recall or remember any actions that he did, or any events that transpired [T. 49 and 50]. Therefore, there was evidence that the appellant's physical condition was related to his mental condition.

The prosecution attacked appellant's contentions as to his condition [T. 85-91]. Yet the Court refused to allow the defense to cross-examine the prosecution's witness Wilson, the appellant's superior, who had seen the appellant shortly before the alleged offense [T. 25], on the subject of the defendant's physical and mental state [T. 28].

Evidence of the mental condition of the defendant at a given time is relevant to determination of mental condition at another time not unreasonably far removed, and it is proper to inquire as to the probability that as of the time of act charged, an accused's mental condition was the same as it was somewhat earlier. *Blunt v. United States,* 244 Fed. 355. Evidence as to accused's mental condition before an offense is admissible insofar as it is relevant to his condition at the time of the offense. *Lyles v. United States,* 254 Fed. 725. Great latitude is allowed in the admissions of evidence as relevant to the issue of insanity, particularly when the insanity is of a temporary nature or is interrupted by lucid intervals. *People v. Mallette,* 39 Cal. App. 2d 294, 102 P. 2d 1084; 1 *Wharton's*

Criminal Evidence, Section 213. Although the evidence must be directed to show defendant's mental condition at the time of the commission of the crime, it is relevant to show acts, conditions, and conduct of the accused both at the time of the offense and prior thereto, including statements made by the accused to others indicating an unsound mind.

1 *Wharton's Criminal Evidence,* Section 213.

It is submitted that the Court erred in restricting the cross-examination of the witness Wilson on the questions of appellant's mental or physical condition.

Specification of Error IV.

The District Court erred in not instructing the jury that the appellant's testimony is to be judged in the same way as that of any other witness.

It is a fundamental concept of our law that a defendant who takes the witness stand in his own behalf is entitled, at the outset, to have his testimony treated by the jury in the same manner as the testimony of other witnesses is treated. To place the defendant in another category would be tantamount to a denial of the presumption of innocence. The trial court in a criminal case is bound to instruct that the jury is the exclusive judge of the credibility of witnesses.

People v. Butterfield 40 Cal. App. 2d 725, 105 P. 2d 628.

So that the jury may appreciate the standards upon which they are to judge the testimony of the defendant, it is correct to instruct them that the defendant's testimony was to be measured according to the same standards as other witnesses.

People v. Ridgeway 89 Cal. App. 615, 265 Pac. 349.

Here the prosecutor specifically requested the Court to instruct the jury in reference to how they should judge his testimony [T. 106]. The record is totally void of any evidence that the Court gave the instruction requested by the government. The only instruction given in regard to credibility of witnesses is set forth on pages 104 and 105 of the transcript. When requested to do so, by either side, the Court is bound to instruct the jury in reference to the credit which should be given to the defendant's testimony.

People v. Rodundo, 44 Cal. 538, 117 Pac. 573.

There was no obligation on the part of defense counsel to join in the request or object to it. The Court failed and refused to give the instruction when the prosecutor asked for it, thus it would have been useless act for the defense to request it. The law does not require useless or idle acts.

Van Gammeren v. City of Fresno, 51 Cal. App. 2d 235, 124 P. 2d 621;

California Civil Code, *Maxims of Jurisprudence,* Section 3532.

Specification of Error V.

The record in this case is void of any competent proof that the letters appellant is charged with embezzling had been placed in the United States mail.

The indictment charges the appellant with embezzling three letters which had been entrusted to him and which had come into his possession intended to be conveyed by mail. None of these three letters were the so-called "test letters" deposited by the postal inspector. The only evidence that they were in the United States mail was the

rank hearsay testimony by the witness Lynch, a postal inspector, who testied as follows:

> "I had nothing to do with those letters, and I never saw those letters prior to their recovery from Mr. Formhals. These are actual bona fide letters mailed by patrons of Hemet. There are four of them. I have since had correspondence with these people, and I have letters to the effect—as to their mailing." [T. 33.]

Testimony of conversations with third persons is objectionable as hearsay and inadmissible.

United States v. Bourjaily, 167 F. 2d 993.

Hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge.

Hopt v. People of Utah, 110 U. S. 574.

While no objection was made to the admission of this evidence nor any motion made to strike the testimony, it is such obvious hearsay and goes to such a fundamental element of the prosecution's case, that a conviction on such evidence should not be permitted to stand.

See

Brown v. United States, 202 F. 2d 474.

Specification of Error VI.

The District Court erred in allowing Witness Lynch, over objection, to testify in regard to the cancellation time differences on the letters introduced into evidence and whether or not long and short letters would be together in the dispatch case at the Hemet Post Office when the witness admitted he was not familiar with the procedure at the Hemet Post Office.

Postal Inspector Lynch was examined as to the two so-called "test letters" which were deposited in the mail by him, neither of which was the basis of any count of the indictment against the appellant. He testified that the postmarks on the two letters were different. The record then indicates the following examination and testimony of this witness:

> "Q. Based on your experience as a postal inspector, is it likely that those would have all been together?
>
> Mr. Hupp: I object to this as—
>
> The Witness: It is impossible.
>
> Mr. Hupp: Just a minute. Don't answer the question while I am objecting, please.
>
> I object to this as calling for a conclusion of the witness and ask that the answer be stricken.
>
> The Court: The objection is overruled.
>
> The Witness: These letters could not have been all as a unit of six, or even as a unit of less than six, because of five different representative mailing points in the city.
>
> Mr. Osborne: I have no further questions." [T. 103].

The question obviously called for a conclusion of the witness. There was no qualification of this witness as an expert on procedure at the Hemet Branch Post Office, nor would this be a proper field for expert testimony. In fact, the record later discloses that the witness was unfamiliar with such procedures at Hemet [T. 104]. Testimony of a lay witness should be confined to concrete facts within his knowledge or observation.

Batsell v. United States, 217 F. 2d 257;

Zimberg v. United States, 142 F. 2d 132.

This improper evidence was directed at a most crucial ultimate fact, and the erroneous ruling was most prejudicial. The very crux of the defense was that the appellant had a repetition of a sick spell and went into the restroom with a handful of mail. [T. 76]. Through this improper evidence, the prosecution was evidently attempting to show that this handful of mail could not have been grouped as a unit.

Opinion evidence on a matter that is fully capable of proof and comprehension from available fact testimony is not admissible, particularly where such evidence is a plain expression of witness' opinion of defendant's guilt.

Wesson v. United States, 164 F. 2d 50.

The conclusion in this instance is particularly objectionable since the procedures at the Hemet Branch with reference to sorting, cancelling and handling of mail could easily have been disclosed. A witness' conclusion should not be admitted in evidence if facts underlying it may be easily stated so as to reproduce to the jury the factual conditions involved.

United States v. Schneiderman, 106 F. Supp. 892.

Conclusion.

Clear and obvious error was committed by the trial court in failing to make a judicial determination of the competency of the appellant to stand trial, and the matter must be remanded for further proceedings on this issue. As set forth above, we submit this error cannot be cured by any *ab initio* determination at this time of appellant's competency over eight months ago. A determination should be made of appellant's competency at this time, with appellant afforded an opportunity to submit evidence

on this question. If appellant is found competent, then a new trial must be ordered.

The Court also clearly erred in failing to instruct the jury on the credibility of appellant's testimony, and in not instructing the jury to totally disregard the administrative statement of charges which was claimed to be a confession. The other errors relating to the exclusion of proper evidence and the admission of improper evidence also would each warrant the reversal of the conviction. And, when these errors are considered cumulatively, justice dictates that the appellant be granted a new trial. We feel an examination of the record will leave this Court in grave doubt as to whether or not these errors had substantial influence in bringing about a verdict, and in such case the error should not be deemed harmless.

Krulewitch v. United States, 336 U. S. 440.

Particularly where counsel who tried the case was not self chosen, but appointed by the Court, the Appellate Court should carefully examine the record

Logan v. United States, 192 F. 2d 388.

We believe a careful examination of this record will convince this Court that the conviction should be reversed and the matter remanded for suitable proceedings on the competency of the appellant to stand trial at this time and appropriate disposition thereafter.

Respectfully submitted,

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